SUPREME COURT OF APPEALS OF VIRGINIA.

COLBY *v.* REAMS.

March 11, 1909.

[63 S. E. 1009.]

1. Appeal and Error (§ 548*)—Record—Evidence—Bill of Exceptions.—The evidence is not a part of the record on appeal, unless made so by proper bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2433; Dec. Dig. § 548.* See, also, 1 Va.-W. Va. Enc. Dig. 508, 511, 560.]

2. Exceptions, Bill of (§ 56*)—Form—Authentication.—A bill of exceptions is ineffective, unless authenticated by the signature of the presiding judge, as required by Code 1887, § 3385 (Code 1904, p. 1793.)

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 95; Dec. Dig. § 56.* See, also, 5 Va.-W. Va. Enc. Dig. 392.]

3. Judgment (§ 198*)—Verdict as Basis—Issues.—A judgment given on a verdict rendered as on the trial of an issue is unsustainable, where no issue was in fact joined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 362; Dec. Dig. § 198.* See, also, 8 Va.-W. Va. Enc. Dig. 295.]

4. Pleading (§ 334*)—Order to File Answer—Failure to File—Effect.—Where, on plaintiff's motion, defendant, who had filed no plea, was ordered to file a statement of his defense on or before 10 days prior to the next succeeding term, which order was not obeyed, the court erred in permitting defendant to introduce his evidence, over plaintiff's objection that issue had not been joined under Code 1887, § 3249 (Code 1904, p. 1709), declaring that when a statement of the grounds of defense is ordered, and the order is not complied with, the court at the trial may exclude evidence of any matter not described in the pleading so plainly as to give the adverse party notice of its character.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1013; Dec. Dig. § 334.* See, also, 2 Va.-W. Va. Enc. Dig. 376, 381.]

5. Witnesses (§ 396*)—Contradictory Statements—Explanation.—Proof of a detached statement by a witness at a former trial, offered to impeach him, did not authorize the party calling the witness to prove all that the witness said when he made such contradicting statement, but only so much thereof as could in some way be connected with the statement proved.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1263; Dec. Dig. § 396. See, also, 13 Va.-W. Va. Enc. Dig. 966, et seq.]

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

Appeal from Circuit Court, Powhatan County.

Action by A. C. Colby against L. W. Reams. Judgment for defendant, and plaintiff appeals. Reversed, and new trial granted.

David Meade White and *W. D. Gay,* for appellant.
W. M. Justis, Jr., for appellee.

HARRISON, J. The declaration in this case avers that the defendant wrongfully and unlawfully manufactured into lumber and disposed of certain trees and logs belonging to the plaintiff, and committed other acts of trespass on his premises. This action of trespass on the case was brought to recover of the defendant the damages claimed to have been sustained by reason of these alleged unlawful acts. There was a verdict and judgment for the defendant, which is now before us for review.

Bill of exceptions No. 9, which was intended to make the evidence a part of the record, is not signed by the judge of the circuit court. The evidence is not a part of the record, unless made so by a proper bill of exceptions. It is not a bill of exceptions, and fails of its purpose, unless it is authenticated by the signature of the judge presiding at the trial. Code 1887, § 3385 (Code 1904, p. 1793); Blackwood Coal Co. *v.* James, 107 Va. 656, 60 S. E. 90.

In this situation of the record there are but two assignments of error that we need notice.

The record fails to show that the defendant entered any plea in this case, and it shows that at the April term, 1907, the court, on motion of the plaintiff, entered an order requiring the defendant to file a statement of his grounds of defense on or before 10 days prior to the next succeeding term. This order was not obeyed; no statement of the grounds of defense being filed at any time. Bill of exceptions No. 3 shows that at the trial, when the defendant offered to introduce his evidence, the plaintiff objected to its introduction because the order of the court requiring the grounds of defense to be filed had not been complied with. The court overruled this objection and permitted the defendant to introduce his evidence, as stated, under the general issue.

This was error. The general rule applying to all actions will not sustain a judgment given upon a verdict rendered as upon the trial of an issue when no issue has been joined. Issue must first be joined on the pleadings. Preston *v.* Salem Imp. Co., 91 Va. 583, 22 S. E. 486.

A state of facts might, however, arise upon which the plaintiff would be estopped to object in this court, for the first time,

that there had been no formal joinder of issue upon the pleadings. See Deatrick *v.* Insurance Co., 107 Va. 602, 59 S. E. 489. But no such conditions exist in the case at bar, which is governed by the general rule already mentioned. Here the plaintiff did all that he could do. He demanded a statement of the grounds of defense relied on by the defendant, and the court entered an order requiring such a statement to be filed on or before 10 days prior to the next succeeding term of the court. This order the defendant did not comply with, and when the plaintiff, for that reason, objected to the introduction of any evidence by the defendant, he was told that the evidence might be introduced under the general issue, when no plea of the general issue had been entered of record. If, however, the general issue had been pleaded, the defendant could not have introduced his evidence under it. That plea, in this case, would have been "not guilty," which would have given the plaintiff no notice of the character of the defense.

Section 3249 of the Code of 1887 (Code 1904, p. 1709) provides that when a statement of the grounds of defense is ordered, and the order is not complied with, the court may, at the trial, exclude evidence of any matter not described in the pleading so plainly as to give the adverse party notice of its character. The object of this section is to give the adverse party full notice of the character of the plaintiff's claim or the defendant's defense. Columbia Accident Ass'n *v.* Rockey, 93 Va. 678, 25 S. E. 1009; Richmond *v.* Leaker, 99 Va. 7, 37 S. E. 348; Tidewater, etc., Co. *v.* Scott, 105 Va. 165, 52 S. E. 835, 115 Am. St. Rep. 864.

In the case at bar the plaintiff was furnished with no notice, and under the terms of the statute the defendant's evidence should have been excluded.

Bill of exceptions No. 4 shows that at the trial the defendant, in his direct examination, testified that certain logs and felled trees, the subject of controversy, were worth only $75. On cross-examination, for the purpose of impeaching him and showing that he had made a different statement under oath about the same matter, the plaintiff read to the defendant, who was testifying in his own behalf, a portion of his answer in a certain chancery suit, and asked him to explain it. On his redirect examination the defendant was permitted, over the objection of the plaintiff, to introduce in evidence the whole of said answer. No part of the answer in question was admissible on the redirect examination of the defendant, except that which related to the value of the logs and felled trees in controversy.

The law is stated in Greenleaf on Ev. (15th Ed.) vol. 1, § 467, as follows: "Proof of a detached statement, made by a

witness at a former time, does not authorize proof, by the party calling that witness, of all that he said at the same time, but only so much as can be in some way connected with the statement proved. Therefore, where a witness has been cross-examined as to what the plaintiff said in a particular conversation, it was held that he could not be re-examined as to the other assertions, made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related, although the assertions as to which it was proposed to re-examine him were connected with the subject-matter of the suit."

The whole of the defendant's answer in the chancery suit is not before us, and therefore we are unable to say whether or not it all related to the value of the logs and felled trees in controversy. If, however, the question should arise on another trial, what has been said will be a guide to its proper solution.

The judgment complained of must be reversed, the verdict of the jury set aside, and a new trial granted.

Reversed.

Note.

It is well settled, of course, that when it is sought to contradict a witness by proof of an inconsistent statement made at another time, the witness must be allowed to explain such previous statement. See 30 Am. & Eng. Enc. of Law, p. 1143. This may be done by allowing other portions of the same statement, conversation or deposition, or the whole thereof if pertinent, to be elicited, either after a foundation has been laid for contradicting such witness by the proof of such a contradictory statement, or by way of rebuttal on re-examination. The test of the extent of the admissibility of the remainder of what was said or testified to, is said, in 30 Am. & Eng. Enc. of Law, p. 1144, to be whether "it is relevant to the matter of credibility." This would seem to be the same rule laid down by Mr. Greenleaf and adopted by the court in the principal case, for "connected with the assertions to which the cross-examination related," and "relevant to the matter of credibility," seem to mean much the same thing, and both tests would exclude other assertions or statements although connected with the subject matter of the suit.

For a case almost exactly in point, see Whitman *v.* Morey, 63 N. H. 448, 2 Atl. 899, 903, where it is held that, where a party reads detached portions of a witness's deposition to the jury for the purpose of contradicting his testimony on the stand, the other party may read other portions of it relating to the same subjects, and tending to qualify, limit or explain the answers so read. Answers in the deposition read by the defendants related to one conversation between witness and the plaintiff and the general rule applies that all of the conversation on the same subject is admissible. If more of the deposition was read than was necessary to explain the portion read by the defendants in the impeachment, it related to immaterial matters and it does not appear that the case was affected thereby, so no reason is furnished for disputing the verdict. See, also, Tennant *v.* Brockover, 12 W. Va. 337, where it is held that, when a witness on cross-examination with a view to impeach her, is asked if she did

not at such a time and place tell so and so, such and such a thing, and answered that she did not, she may on re-examination state what she did at the time and place say to the same person on the subject, if it is relevant to the issue, although no proof of such contradictory statement has yet been made. Here the question at issue upon which a foundation for proving a contradictory statement had been laid was precisely the same as that upon which the whole case turned. J. F. M.

COMMONWEALTH *et al. v.* CAMP MFG. CO.

Jan. 14, 1909. Rehearing Denied March 1, 1909.

[63 S. E. 978.]

1. Taxation (§ 327*)—Assessment—Land and Timber.—Const. 1902, § 171 (Code 1904, p. cclxiii), provides for a reassessment of real estate in the year 1905 and every fifth year thereafter. Code 1887, § 441, as amended by Acts 1889-90, p. 137, c. 180 (Code 1904, p. 234), requires the assessors to examine all the land and lots within their respective counties or districts, and assess the cash value thereof, and to comply with section 472 of the Code of 1887 (Code 1904, p. 246). Code 1887, § 472, as amended by Acts 1889-90, p. 137, c. 180, provided that, if the land is held by one person and the standing timber by another, the commissioner should determine the relative value of each, and assess the several owners with the value of their respective interests, but that, if the land and timber were owned by the same person, the commissioner should ascertain the value of the land including the timber. Held, that an assessment in 1905 was properly made by assessing the land and timber separately, and such assessment furnished a proper basis for a taxation for 1906 and 1907, and the validity of such assessment was not affected by the question whether Acts March 17, 1906 (Acts 1906, p. 555, c. 319), repealed section 472 of the Code.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 327.* 12 Va.-W. Va. Enc. Dig. 782.]

2. Taxation (§ 327*)—Assessment—Statutory Provisions.—Const. 1902, § 172 (Code 1904, p. cclxiii), requires the General Assembly to provide for the special and separate assessment of coal and other mineral land, and that until such special assessment is made the land shall be assessed under general laws, but does not authorize a special assessment of standing timber apart from the land. Held, that Code 1887, § 472, as amended by Acts 1889-90, p. 137, c. 180 (Code 1904, p. 246), providing that, if the surface of land is held by one person and the

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